86-255

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MICHAEL A. KUZMIAK,

Petitioner,

vs.

PATRICIA KUZMIAK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether a California state court's assumption of jurisdiction, in marital dissolution proceedings, over a military member's nondisability retired pay and Hawaii and Arizona real property violated the due process clause of the Fourteenth Amendment, the privileges and immunities clauses of the United States Constitution and the Fourteenth Amendment, and the jurisdictional provisions of the Federal Uniform Services Former Spouses' Protection Act, 10 U.S.C. section 1408.

2. Whether federal law or Congressional intent precludes a California state court, in marital dissolution proceedings, from dividing military nondisability retired pay that is derived from a military member's separation pay under 10 U.S.C. section 1174.

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OPINION BELOW [1]

The Court of Appeal of the State of California, Division Six of the Second Appellate District, issued an opinion in this case. A copy of this opinion appears in Appendix A to this Petition at pages 1 through 31. Portions of this opinion were certified for publication and reported as Kuzmiak v. Kuzmiak, 176 Cal.App.3d 1152, 222 Cal.Rptr. 644 (1986).

JURISDICTION

The Order of the California Supreme Court denying review after judgment by the California Court of Appeal was entered on May 22, 1986. A Petition for Writ of Certiorari can be filed within ninety (90)

1/ The caption of the case in this court contains the names of all parties. Rule 21.1(b), Rules of the Supreme Court of the United States.

days of said denial. American Railway Express Co. v. Levee, 263 U.S. 19 (1923). Jurisdiction of this court is invoked pursuant to 28 U.S.C. sections 1257(3), 2101(c), and 2106, in that the application of community property principles to military separation and nondisability retired pay as well as to out-of-state real property threatens grave harm to the clear and substantial federal interests in federal military forces. McCarty v. McCarty, 453 U.S. 210 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1978). Further, under 28 U.S.C. 2403(b), the constitutionality of California Civil Code, section 4803, is drawn in question and appropriate service has been made. Rule 28.4(c), Rules of the Supreme Court of the United States.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions considered in this case are:

1. Article IV, Section 2, Clause 1, of the Constitution of the United States, which provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

2. The Fourteenth Amendment of the Constitution of the United States, which provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; . . . . "

3. 10 U.S.C. section 1408(c)(4), which provides:

"A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court or (C) his consent to the jurisdiction of the court."

4. California Civil Code, section 4800(a), which provides, in part:

" . . . the court shall, either in its judgment of dissolution of the marriage . . . or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties

equally.

5. California Civil Code, section 4803, which provides, in part:

"As used in this part, 'quasi-community property' means all real and personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition."

STATEMENT OF CASE

Through marital dissolution proceedings, the Superior Court of the State of California for the County of Santa Barbara (hereinafter "superior court") assumed jurisdiction to divide quasi-community [2]/ personal and real property of a career Air Force Officer and his wife.

Michael Kuzmiak was a Captain with the United States Air Force. [3]/ He grew up in New Jersey and entered Air Force service in that state on May 6, 1966. (Appendix A, p. 3) The marriage to Patricia Kuzmiak

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2/ Quasi-community property is defined by California Civil Code, section 4803, set forth, in full, at page 5 hereof.

3/ Because Captain Kuzmiak was "passed over" twice when considered for the grade of Major, he was involuntarily discharged on February 28, 1983 from the United States Air Force under 10 U.S.C. section 632. He immediately enlisted in the United States Air Force as an enlisted member, a Sergeant.

occurred four (4) months later in New Jersey; but the couple, on the date of the marriage, moved, under military orders, to Texas. Subsequently, Captain Kuzmiak served, under military orders, in Texas, New York, North Dakota, and commencing in 1975, in California. (Appendix A, p. 3)

While stationed in California under military orders, Captain Kuzmiak maintained a New Jersey driver's license, registered his car in New Jersey, and voted in New Jersey by absentee ballot. (Appendix A, p. 4) He filed an annual certificate with the military stating that he was a New Jersey resident; and he was thereby exempt from New Jersey income taxation. (Appendix A, p. 4) Captain Kuzmiak filed California nonresident income tax returns during the time that he was in California. (Appendix A, p. 4)

Throughout the marital dissolution proceedings, Captain Kuzmiak contended and testified that he was, at all times, a domicile of New Jersey, not California; that he moved to and stayed in California only because of military orders; and that he never intended to become domiciled in California. (Appendix A, pp. 3 and 4)

Patricia Kuzmiak, his wife, never denied or contradicted this evidence or the testimony of Captain Kuzmiak regarding his domicile. She testified that she, however, had "intended to become" a California domicile. (Appendix A, p. 4) Further, since the dissolution of their marriage [4/], she had filed California tax returns, although she still maintained a New Jersey

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4/ This was a bifurcated marital dissolution proceeding in the State of California, so that the marital status of the parties was dissolved almost three years before orders determining the division of the quasi-community property.

driver's license. (Appendix A, p. 4)

The marital dissolution proceedings were instituted by wife Patricia Kuzmiak (hereinafter sometimes "Patricia") with the filing of a petition for dissolution on June 9, 1980, asserting that she was a resident of the State of California for at least six (6) months and of the County of Santa Barbara for at least three (3) months "immediately preceding" the filing of her petition for dissolution. 5/ Husband, Michael Kuzmiak (hereinafter sometimes "Michael") filed a standard Response

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5/ These are the designated jurisdictional "residency" requirements of the State of California for its court to grant a judgment of dissolution of marriage. California Civil Code, section 4530(a).

California's jurisdiction is as broad as the Constitution permits. California Civil Procedure Code, section 410.10. Kulko v. California Superior Court, 436 U.S. 84 (1978).

(Family Law) [6] and left blank the residency declarations of said form.

On November 19, 1980, the superior court entered an Interlocutory Judgment of Dissolution of Marriage dissolving the status of marriage of the parties only. [7] On May 5, 1981, the remaining issues of the marital dissolution proceeding were to be heard, subject, however, to a stipulation between the parties and verbalized on the

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6/ In California, petitions for marital dissolution and responses thereto as well as many other marital dissolution pleadings must be on preprinted forms mandated by the Judicial Council of California. On Petitions (Family Law) and Responses (Family Law), see California Rules of Court, Rule 1215, sections (b) and (c), respectively.

7/ Interlocutory Judgments are no longer issued in California. There are now only judgments of dissolution which specify an effective date six (6) months after service or later. California Civil Code, section 4514; California Rules of Court, Rule 1287. California marital dissolution proceedings employ the concept of a "divisable divorce". Estin v. Estin, 334 U.S. 451 (1948); 3 Stanford Law Review 622.

superior court's record by Michael's trial counsel, with the agreement of Patricia's trial counsel, as follows:

> "Your Honor, at the . . . pre-trial conference we had when we were scheduling the trial, counsel for petitioner (Patricia) indicated he would stipulate as to the issue as to whether Mr. Kuzmiak is a domiciliary of the State of California and therefore subject to the jurisdiction of this Court insofar as the military retirement benefits and certain property which was brought into the State of California from another jurisdiction." 8/ (Appendix C, pp. 50 and 51)

8/ Although not very specific, this refers to the Arizona and Hawaii real properties of the parties purchased while they were stationed in North Dakota.

The trial of the remaining issues proceeded on May 5 and 6, 1981, before an assigned municipal court judge who, at the conclusion of the trial, found that

> " . . . the parties are residents of California and New Jersey" (Emphasis added, Appendix B, p. 32)

and entered various orders regarding custody and visitation, support, and California real property, reserving certain issues for further trial proceedings.

Said further trial proceedings never occurred. Instead, a stipulation by the parties and subsequent court order of October 5, 1982 vacated all orders, except those pertaining to child custody, visitation, child and spousal support and status. (Appendix B, p. 38)

On December 2 and 5, 1983, with each of the parties having new trial counsel and with a regular superior court judge, the

remaining issues were tried. A portion of the trial was devoted to the domicile of Michael and the resultant jurisdiction of the Superior Court over his military separation pay [9/] and the real property in Hawaii and Arizona. The Order After Hearing (Appendix B, pp. 34 through 46) determined, in its pertinent parts hereto,

> " . . . That Mr. Kuzmiak is a resident and domiciliary of the State of California within the meaning of California Civil Code, section 4803 and that the property in question is quasi-community in character. . . ." (Appendix B, p. 40)

9/ Retirement benefits had become separation pay. On February 28, 1983, Michael was involuntarily discharged from the United States Air Force at Vandenberg Air Force Base, as he was "passed over" for selection to the grade of Major. 10 U.S.C. section 632. He was thereby entitled to separation pay under 10 U.S.C. 1174.

" . . . That the funds received by the Husband upon separation from the United States Air Force, $24,000.00, was retirement pay or payment in lieu of retirement pay (subject to quasi-community property division) . . . " (Appendix B, p. 40)

" . . . That the two (2) pieces of unimproved real property in Hawaii and Arizona are equal in value; and the Wife is awarded the Hawaii property and the encumbrance thereon and the Husband is awarded the Arizona property and the encumbrance thereon . . . ." (Appendix B, pp. 41 and 42)

An appeal was lodged by Michael to the Court of Appeal of the State of California, Division Six of the Second Appellate District, whose determination is sought to

be reviewed. (Appendix A, pp. 1-31) The appellate briefs considered the jurisdiction of the California courts. The appellate court [10/] found that Michael was a domicile of California, as

> "A finding of husband's California domicile is necessary to support a division of his longevity pension under FUSFSPA absent his voluntary residence in the state or his consent to jurisdiction . . . (Appendix A, p. 23) (and)
>
> " . . . a finding of California domicile of both spouses is necessary to confer jurisdiction upon the court to divide any quasi-community property

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10/ Portions of the California appellate court's opinion concerning its separation pay determinations were published. Kuzmiak v. Kuzmiak, 176 Cal.App.3d 1152, 222 Cal.Rptr. 644 (1986).

of the marriage. (In Re Marriage of Fransen, (1983) 142 Cal.App.3d 419, 430. The trial judge's division of the couple's Hawaii and Arizona properties as quasi-community property rests upon this domiciliary jurisdiction." (Appendix A, pp. 24 and 25)

Thereupon, the Court of Appeal determined that:

1. Michael's military separation pay under 10 U.S.C. section 1174 was his separate property unless he applies for military retirement. If such an application occurs in conjunction with Michael's enlistment [11], his separate property would be converted into community property subject to division by the

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11/ Immediately upon his involuntary discharge as a Captain from the United States Air Force at Vandenberg Air Force Base, California, Michael enlisted, as an enlisted member in the United States Air Force, a Sergeant.

California superior court. (Appendix A, pp. 17-21)

2. The Hawaiian and Arizona real properties were subject to division by the California superior court; but since there was insufficient evidence of the value of these properties, the cause was remanded for a new hearing. (Appendix A, pp. 29 and 30)

A Petition For Rehearing was immediately lodged by Michael for consideration of the issue of Patricia's interest, if any, in Michael's military nondisability retired pay, acquired with separation pay after marital separation, 12/ and

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12/ The appellate court found that separation pay under 10 U.S.C. 1174 was Michael's separate property under McCarty v. McCarty, 453 U.S. 210 (1981). However, the appellate court further determined that by reason of Michael's enlistment, the separation pay was transmuted into community property even though the separation pay was separate property reinvested by Michael upon enlistment after marital separation, all by reason of 10

reconsideration of the appellate court's determination of Michael's California domicile since it was based primarily on Michael's enlistment after marital separation. The Petition for Rehearing was denied on February 25, 1986.

A Petition for Review by the California Supreme Court was thereafter requested by Michael. With one dissent, the Petition For Review was denied on May 22, 1986. (Appendix B, p. 48)

REASONS FOR GRANTING A WRIT

A. Jurisdiction of the California State Courts Over Quasi-Community Property.

In these marital dissolution proceedings between the Kuzmiaks, the California state court assumed jurisdiction

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U.S.C. section 1174(h)(1). Since this extension of the California court's authority had not been argued or briefed earlier, a Petition For Rehearing was lodged, but denied.

to divide the military nondisability retired pay and the Arizona and Hawaii real properties on the basis that Michael was a domicile of the state of California.

The evidence and testimony of Michael regarding his New Jersey domicile was uncontroverted. However, the state court seized upon Michael's enlistment in the Air Force at Vandenberg Air Force Base, California, immediately after his involuntary discharge under 10 U.S.C. section 632 and determined that he was a California domicile, even though these actions took place some three (3) years after the institution of the state marital dissolution proceedings. 13/

13/ The date when jurisdiction of California state courts over military nondisability retired pay is determined is currently in dispute in California. Compare Miller v. Miller, 176 Cal.App.3d 1183 (1986) (assuming jurisdiction to divide retired pay of a nonresident based on a 1970 judgment of dissolution) with

The predecessors to the California statute in question, California Civil Code, section 4803, [14] which defines "quasi-community property", had a long history of unconstitutionality. In re Thornton's Estate, 1 Cal.2d 1 (1934). Particularly, the ongoing issue was how could the State of California in dividing property brought into this state from common law states (such as New Jersey), through marital dissolution proceedings, avoid the due process and privileges and immunity clauses of the Constitution and its Fourteenth Amendment. The statute was revised in 1961. [15] Addison v. Addison,

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Tarvin v. Tarvin, 182 Cal.App.3d 721 (1986) (declining jurisdiction under similar circumstances). Review by the California Supreme Court was denied in Miller, supra.

14/ See page 4-5 for complete statute.

15/ The 1961 statute was different from the current version, as it stated ". . . 'quasi-community property' means all

62 Cal.2d 558, 399 P.2d 807 (1965) sustained its constitutionality on the basis that

> " . . . the concept of quasi-community property is applicable only if a divorce . . . is filed here <u>after</u> the <u>parties</u> have become domiciled in California" (emphasis added).
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> <u>Addison</u>, <u>supra</u>, 62 Cal.2d 558, 566.

By basing its claim of jurisdiction on

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personal property wherever situated and all real property situated in this state heretofore and hereafter acquired . . ."

Changes were made in 1975, adding real property to this section; and these changes have never been judicially challenged. The current California Civil Code, section 4803, reads, in part:

> " . . . 'quasi-community property' means all real and personal property, wherever situated, heretofore or hereafter acquired in any of the following ways . . . "

Since the statute was originally enacted in 1891, it underwent changes in 1917 and 1923 until <u>Addision</u>, <u>supra</u>, determined its constitutionality.

events happening three (3) years after the institution of these dissolution proceedings, the California state court neglected the safeguards of Addision, supra, and thereby violated the constitutional rights of Michael Kuzmiak. In re Thornton's Estate, supra.

An award of marital property to one spouse in marital dissolution proceedings is an exercise of "in rem" jurisdiction. Penoyer v. Neff, 95 U.S. 714 (1878). Jurisdiction over the marital "res" or status does not carry with it jurisdiction over marital property. Thus, the power to award property between the contending marital partners is governed by the general principles of jurisdiction of a state over property, 2 Witkin, California Procedure, 3d Ed., p. 598; 3 Stanford Law Review 622, with each right or property considered separately. Estin v. Estin, 334 U.S. 451 (1948).

Since the state court was dealing with "quasi-community property, when considering the military nondisability retired pay and the Arizona and Hawaii real properties, both parties had to be domiciled in California prior to the institution of the dissolution proceedings for the court's jurisdiction. In re Marriage of Roesch, 83 Cal.App.3d 96 (1978); Fransen v. Fransen 142 Cal.App.3d 419 (1983). This case development in California, which was emphasized by the appellate court in its opinion, Appendix A, page 25, is an application of the principles governing state jurisdiction over property. Or in terms of International Shoe Company v. Washington, 326 U.S. 310 (1945), a determination of whether there existed certain minimum contacts with California so that jurisdiction over the quasi-community property of the Kuzmiaks, the military

nondisability retired and separation pay and the Arizona and Hawaii real property, did not offend the "traditional notions of fair play and substantial justice." Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. California Superior Court, 436 U.S. 84 (1978).

In exploring these "traditional notions of fair play and substantial justice", the California state court's jurisdiction over the Arizona and Hawaii real properties of the Kuzmiaks must consider the doctrine of Fall v. Estin, 21 U.S. 1 (1909) and its jurisdiction over th military nondisability retired and separation pay must consider, the provisions of 10 U.S.C. section 1408(c)(4).

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1. Certiorari Should Be Granted As The California State Court's Assumption Of Jurisdiction To Divide The Military Nondisability Retired Pay And Arizona And Hawaii Real Properties Within Marital Dissolution Proceedings Violated The Constitutional Rights Of Michael Kuzmiak Under The Due Process And Privileges And Immunities Clauses Of The Constitution And Fourteenth Amendment.

By uncontroverted evidence and testimony, Michael Kuzmiak was clearly a domicile of New Jersey at the institution of the California marital dissolution proceedings in 1980. The mere fact, that three (3) years subsequent thereto he enlisted in the Air Force at the same installation, Vandenberg Air Force Base, California, as he was involuntarily discharged from military service, should not change this conclusion. A military

member is not obligated to enlist in his home state; and it seems somewhat ridiculous for an individual, all at United States government expense, to travel via discharge orders to his home state to enlist and then to travel via enlistment orders back to California as Vandenberg Air Force Base was Sergeant Kuzmiak's duty station. Every indicia of domicile in New Jersey, that could be maintained, was accomplished by Michael. (See page 7, supra.) In addition, the State of California never questioned and voluntarily accepted Michael Kuzmiak's nonresident tax returns, thereby assenting to his non-resident status.

> "The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights and interests of

nonresident defendants."

(Kulko v. California Superior Court, supra, 436 U.S. 84, 91. .

See also Shaffer v. Heitner, supra. The assumption of jurisdiction by the California Superior Court over the rights and interests of Michael Kuzmiak in quasi-community property thus violated his due process rights.

Further, when Michael acquired his interest in the military nondisability retired pay and in the Arizona and Hawaii real properties, all rights in that property given him by the law of his domicile, vested in him. The application of California Civil Code, section 4803 to this property without Michael being domiciled in California prior to the institution of marital dissolution proceedings, constituted a taking of property without due process, as already determined by California's own state

supreme court. In re Thornton's Estate, supra. 16/ The California state court was decreasing Michael's property interest gained through his common law state of New Jersey and simultaneously increasing Patricia's, all in violation of the Fourteenth Amendment.

Under the privileges and immunities clause of section 2 of article IV of the Constitution of the United States, citizens of each state are given the privileges and immunities of citizens of all the states. U.S. v. Wheeler, 254 U.S. 281 (1920). The State of California cannot change the application of existing property laws to affect existing property rights of

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16/ This same argument applies to the California state court's "transmutation" of Michael's separation pay, which the California state court determined to be separate property, into community property, if Michael elected to enlist in military service after the date of separation! See pages 41-42, ante.

California citizens (Spreckels v. Spreckels, 116 Cal. 339 (1987); and thus, the California state court change of the property rights of Michael in regard to his military nondisability retired pay and Arizona and Hawaii real property constitutes a violation of the Constitution's privileges and immunities clause, as again determined by the California Supreme Court in In re Thornton's Estate, supra.

In addition, the Fourteenth Amendment protects the privileges and immunities of the citizens of the United States, as opposed to those of the citizens of the several states. Hamilton v. Regents of the University of California, 293 U.S. 254 (1934). The California state court, by reclassifying Michael's property interest in his military nondisability retired pay and Arizona and Hawaii real property, diminished his marital property rights and thereby infringed upon Michael's rights

under the Fourteenth Amendment. In re Thornton's Estate, supra.

In summary, the California state court's assumption of jurisdiction to divide Michael's military nondisability retired pay and Arizona and Hawaii real property within marital dissolution proceedings violated his constitutional rights under the due process and privileges and immunities clauses of the Constitution and the privileges and immunities clause of the Fourteenth Amendment.

2. Certiorari Should Be Granted As The Division And Award Of Out-Of-State Real Property By A California State Court Violated The Settled Doctrine Of Fall v. Estin, And Thereby, The "Traditional Notions Of Fair Play and Substantial Justice" Under International Shoe.

By assuming jurisdiction over, and then dividing, the Arizona and Hawaii real properties, the California state court

violated the "traditional notions of the fair play and substantial justice" concerning out-of-state real property as espoused in the doctrine of Fall v. Estin, supra. As recently stated in Perry v. O'Donnell, 749 F.2d 1346 (9th Cir. 1984):

> "It is well settled that although a court may have in personam jurisdiction to order one of the parties to convey to the other party a deed to property in another state, it cannot directly affect or determine title to that real property."

The order of the California trial court, as impliedly affirmed by the California appellate court, 17/ violated its own

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17/ The California appellate court in returning this case for retrial did not recognize this reasoning or the application of California Civil Code, section 4800.5, but appeared to expect the trial court to

statute, California Civil Code section 4800.5, which directs the manner in which California trial courts are to deal with out-of-state property. Rozan v. Rozan, 4 Cal.2d 322 (1957). By applying the seasoned and traditional doctrine of Fall v. Estin, supra, herein, the California state court lacked jurisdiction to affect and determine interests in the Arizona and Hawaii real properties in the manner that was accomplished herein.

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divide the Arizona and Hawaii property directly on the basis of appropriate evaluation.

3. Certiorari Should Be Granted As The Division And Award Of Military Nondisability Retired Pay Violated The Jurisdictional Provisions Of The Federal Uniform Services Former Spouses' Protection Act, 10 U.S.C. Section 1408(c)(4), And Thereby, The "Traditional Notions Of Fair Play And Substantial Justice" Under International Shoe.

The jurisdictional section of the Federal Uniform Services Former Spouses' Protection Act ("FUSFSPA"), 10 U.S.C. section 1408(c)(4), provides that a court may not divide military nondisability retired pay

> " . . . unless the court has jurisdiction over the member by reason of
>
> (A) His residence, other than because of military assignment, in the territorial jurisdiction of the court,

(B) His domicile in the territorial jurisdiction of the cour or

(C) His consent to the jurisdicti of the court."

The original version of FUSFSPA based jurisdiction upon personal jurisdiction, i.e. minimal contacts with the state. However, to allay military concerns over forum shopping spouses of service members, these provisions were amended in the House of Representatives to the current version. Sen. Rep. No. 59-502, reprinted in 1982 U.S. Code Cong. & Admin. News, pp. 1603-1604; House Conf. Rep. No. 97-749, reprinted in 1982 U.S. Code Cong. & Admin. News, p. 1572.

In evaluating the California state court's basis for jurisdiction, it is clea that Michael did not consent to the jurisdiction of the California state court This issue of jurisdiction was appropri-

ately reserved and fully litigated at trial.

The California Supreme Court has defined "domicile" and "residence" as follows:

> "Courts and legal writers usually distinguish 'domicile' and 'residence', so that 'domicile' is the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain, whenever he is absent, he has the intention of returning, but which the law may also assign him to constructively; whereas 'residence' connotes any factual place of abode of some permanence, more than a mere temporary sojourn. 'Domicile' normally is the more comprehensive term, in that it includes both the act

> of residence and the intention to remain; a person may have only one domicile at a given time, but he may have more than one physical residence separate from his domicile, and at the same time." Smith v. Smith, 45 Cal.2d 235, 239 (1955).

It was only because of military orders that Michael was in, and continued to be in, the State of California. As shown on page 7 hereof, Michael had a New Jersey driver's license, voted in New Jersey, and indeed maintained every indicia of New Jersey domicile possible. Further, this evidence and documentation of domicile went unchallenged by Patricia; and the State of California assented and accepted 8 years of Michael's nonresidencey tax returns, wherein he claimed to be a New Jersey domicile. An initial court finding, Apendix B, p. 32, even determined that he was a New Jersey domicile. The California

superior and appellate courts, however, found that Michael was a domicile on the basis of his enlistment in the United States Air Force at Vandenberg Air Force Base, [18] immediately after his involuntary discharge under 10 U.S.C. section 632, for his continuous duty assignment at Vandenberg Air Force Base. This action was realistically taken for the benefit of the Air Force [19] and should not

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18/ Vandenberg Air Force Base, California, however, is a federal enclave. It is a pocket of federal land in California, subject to federal law and not California law. Thus, the actions taken by Michael at Vandenberg Air Force Base were taken on federal land, were not taken "in California", and should not be used against him.

19/ The United States Air Force avoided costs of travel, moving, etc. in conjunction with Michael's enlistment. He could have been discharged, moved everything to New Jersey, enlisted, and then been shipped back out to Vandenberg Air Force, California. Instead, for the benefit of the Air Force and service of his country, he remained in his ongoing duty assignment at Vandenberg Air Force Base, California.

be construed as indicative of the intent of Michael to become a resident of California. California was not Michael's "residence, other than because of military assignment" nor was it his "domicile", as required by 10 U.S.C. 1408(c)(4). Thus, the California court had no jurisdiction over the military nondisability retired pay.

B. Nondisability Retired Pay

Under the guidance of McCarty v. McCarty, supra, the California appellate court determined that Michael's separation pay under 10 U.S.C. 1174 was his separate property. However, the same court went on to hold that if Michael reinvested his separate property separation pay in conjunction with his post-marital separation enlistment with the Air Force, and was thus entitled to nondisability retired pay, his nondisability retired pay

would revert to the jurisdiction of the California court and could be divided between the Kuzimaks.

1. Certiorari Should Be Granted As Division Of Nondisability Retired Pay Acquired Through Reinvestment Of Post-Marital Separation Pay, Conflicts With The Congressional Intent Underlying Separation And Retired Pay.

McCarty v. McCarty, supra, following Wisner v. Wisner, 338 U.S. 655 (1950), and Free v. Bland, 369 U.S. 663 (1962), determined that personal entitlements of military members could not be divided by California state courts, as "it is not the province of state courts to strike a balance different from the one Congress has struck." Hisquierdo v. Hisquierdo, 339 U.S. 572, 590 (1979). As a personal entitlement of military members, separation pay is a military member's separate property, not subject to jurisdiction of,

and division by, the California state courts, as determined by the California appellate court in its published decision. If Michael chooses to reinvest his separation pay in a military career, rather than a civilian career, this result should not change. The separation pay should not then become quasi-community property subject to division by California state courts, as the California appellate court determined.

The intentions of Congress in allowing separation pay were to financially assist the discharged military member and to allow him to make a career transition. House Rep. No. 96-1462, reprinted in 1980 U.S. Code Cong. & Admin. News, p. 6361. It literally makes no difference whether this involves a change to civilian life or military enlisted life. Rather than finding a new civilian career, Michael chose to find a new military career. By

taking a reduction from being an officer, Captain, to being an enlisted member, a Sergeant, Michael will undergo significant financial losses and his career will change from one of leadership to that of technical accomplishments. Further, his retirement will be substantially less than if he had made Major. Thus, having once decided that Congress intended separation pay to be the personal entitlement of military members, the California state courts cannot take this entitlement away by restricting the manner in which the individual reinvests his separation pay.

2. Certiorari Should Be Granted As The Transmutation Of Post-Marital Separation Military Separation Pay Into Quasi-Community Property Amounts To A Taking Of Property Without Due Process In Violation Of The Fourteenth Amendment.

The California appellate court unequivocably determined that separation

pay was Michael's separate property and was not subject to California jurisdiction because of the Congressional intent in according said personal benefit.

That should have been the end of the analysis, as what happens to separate property not subject to California jurisdiction is not within the province of the state court. Its jurisdiction has been lost. It cannot condition the investment possibilities open to a discharged military member without running afoul of the Fourteenth Amendment's mandate against taking property without due process. Herein, the California state courts, under a published decision, are invoked to transmute property not subject to their jurisdiction into quasi-community property subject to their jurisdiction. Certiorari should be granted to insure that the Congressional mandates for separation pay are honored and to avoid the taking of

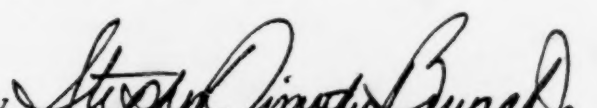
property without due process from military members in California.

CONCLUSION

Petitioner Michael Kuzmiak prays that a writ of certiorari be granted so that the due process rights, privileges and immunities afforded him and the military members under the Constitution of the United States and its Fourteenth Amendment are honored and so that the personal entitlements provided him as a discharged military officer under 10 U.S.C. section 1174 are gained.

Dated: August 15, 1986

Respectfully submitted,

By 
STEPHEN TIMOTHY BUYNAK, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I, S. Timothy Buynak, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Michael Kuzmiak, petitioner herein, hereby certifies that on August 15, 1986 pursuant to Rule 28, Rules of the Supreme Court of the United States, I served three (3) copies of the foregoing Petition For Writ Of Certiorari together with three (3) copies of the Appendix thereto, on each of the parties herein and the State of California by placing three (3) true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Barbara, California, addressed as follows:

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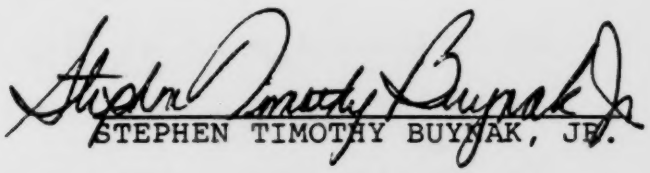
All parties required to be served have been served.

Dated: August 15, 1986



STEPHEN TIMOTHY BUYNAK, JR.